In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-906

PATRICK M. SCHOTT and
JOAN G. SCHOTT,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I N D E X (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

PATRICK M. SCHOTT and
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versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REVIEW ON WRIT OF CERTIORARI

The petition of Patrick M. Schott[1] and Mrs. Joan G. Schott with respect represents that:

A.

This has reference to an unpublished opinion of the United States Court of Appeals for the Fifth Circuit in the case entitled "Patrick M. Schott and Mrs. Joan G. Schott vs. United States of America" docket No. 77-2044, copy of which is attached affirming a judgment of the United States District Court for the Eastern District of Louisiana for the reasons assigned by Honorable Alvin B. Rubin, copy of which is also attached.

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1. Nominal plaintiffs are husband and wife who filed joint income tax return for 1972. For purposes of this petition, singular plaintiff denotes Patrick M. Schott, a judge of the Court of Appeal, Fourth Circuit, State of Louisiana.

B.

(i) Said judgment sought to be reviewed was entered on September 23, 1977.

(ii) No rehearing was applied for in the Court of Appeals.

(iii) Jurisdiction is believed to be conferred on this Court to review said judgment by the Constitution of the United States; Title 28, of the United States Code § 1254, (1); and Rule 19(1) (b) of the Supreme Court Rules.

C.

The questions presented for review are as follows:

1) Is the decision of this Court in *McDonald v. CIR.* 323 U.S. 57, 655 Ct. 96, 89 L.Ed. 68 (1944) still viable after the passage of 33 years of time and the occurrence of so many drastic changes in attitudes and philosophy?

2) Is the fundamental rationale of *McDonald* consistent with decisions of the Tax Court of the United States allowing deductions for income tax purposes of fees paid to employment counselors by corporate executives seeking a change in employment?

3) Is not the rationale of these employment counselor fee cases particularly applicable to the case of plaintiff whose basic profession was that of lawyer when he ran for the office of judge in an election?

4) Are the *McDonald* case and its progeny applicable in any way to the facts of this case?

D.

The statutes which this case involves are from the Internal Revenue Code of 1954 (26 U.S.C.) as follows:

"SEC. 162. TRADE OR BUSINESS EXPENSES

(a) *In General.* -- There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business,* * *

* * * *

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year --

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax."

E.

STATEMENT OF THE CASE

This is a suit for refund of income taxes based upon the alleged deductibility of campaign expenses incurred by plaintiff in seeking election as a judge. Plaintiff claimed that the expenses were deductible under Section 162 of the Internal Revenue Code of 1954, as ordinary and necessary business expenses, or under Section 212 as ordinary and necessary expenses incurred for the production of income. The case was presented to the district court on cross motions for summary judgment, there being no dispute about the facts of the case. From a judgment of the district court granting the motion of defendant and denying the motion of plaintiffs, the latter have taken this appeal.

On September 20, 1972, plaintiff was elected Judge of the Court of Appeal, Fourth Circuit, State of Louisiana, and he took his oath of office on December 12. He was actively engaged in the practice of law until December 12,notwithstanding the fact that he had been engaged in an intensive time-consuming and prolonged campaign leading up to his election. The great bulk of plaintiff's income for the year 1972 came from his law practice. A great part of plaintiff's campaign expenditures were incurred in advertising. On their tax return for 1972 plaintiffs claimed as a deduction the unreimbursed campaign expenses he incurred in his election campaign. The expenses were disallowed as a deduction, an additional tax liability was assessed against plaintiffs and this was thereafter paid in full. Plaintiffs are seeking a refund of $3,879.37 plus interest.

G.

The basis for jurisdiction over the case by the United States District Court was 28 U.S.C. § 1340, 1346 and 26 U. S.C. § 7422.

H.

ARGUMENT

Rule 19 provides that this Court will consider as a reason for granting a writ of certiorari the situation where the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court." It is this standard on which plaintiffs rely for this Court to consider each of the questions presented for review.

1) Argument on Question 1

The law relied upon by the Court of Appeals in this case is not settled because the only authority from the Court on the subject is an obsolete, outdated, perhaps ancient, 1944 decision of this Court.

In 1946 this Court refused to declare an Illinois reapportionment statute unconstitutional, taking the position that plaintiff's remedy was to secure proper reapportionment from the state legislature. *Colgrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198. The prevailing attitude of the Court was best exemplified by one sentence: "Courts ought not to enter this political thicket." The obsolescence of the *Colgrove* case and its philosophy is obvious and need not be labored in this brief. Suffice it to say that today's courts

routinely take an active role in drafting and revising constitutions, charters, statutes and ordinances for state, county and municipal governments.

McDonald is a creature of the same age as *Colgrove*. Plaintiffs are asking that this Court re-examine *McDonald* in light of today's realities in considering whether it applies to the instant case and not simply accept *McDonald* as controlling in 1977 when it was written to deal with problems as they existed in 1944.

Judge McDonald spent some $13,000 on his 1939 campaign when there was no television, and a first-class letter could be mailed for three cents. Plaintiff could produce only a modest television promotion for $13,000 in 1972, and the cost of mailing a single item to all of the registered voters to whom he was appealing exceeded $20,000. The realities of today required plaintiff to spend a large sum of money to wage a serious campaign for his office.

Congress, state legislatures, good government groups and the public are concerned about the ethical implications of campaign funding. Much legislation has resulted already and additional legislation will surely be forthcoming.

The concern is justified. The potential for corruption of public officials who must solicit contributions from individuals and groups to gain public office has been, and continues to be demonstrated. In Louisiana, where judges must enter into political campaigns of the same type as those entered into by candidates for legislative and executive offices, the specter of favoritism on the bench resulting from campaign contributions is a real and present danger to the integrity of the judiciary.

Plaintiff spent his own money running for his office and seeks only a modest incentive of being able to deduct his campaign expenses from his income tax for the year in which he ran. What rational basis is there for rejecting such a simple and straight forward method of encouraging candidates for judicial office to finance their own campaigns as opposed to solititing contributions and becoming beholden to individuals and groups?

Judges are in a class apart from members of the executive and legislative branches of government. The latter may legitimately reward contributors by appointments to boards or commissions or they may legitimately favor legislation which is supported by their contributors. But a judge's duty is to decide cases fairly and justly without regard to personalities and regardless of personal prejudices. There should be an ironclad insulation of judges from influences by anyone, including campaign contributors.

There is another distinction between judges and other candidates in that the judicial candidate normally seeks the office with the idea of making the judiciary a lifetime carerr. If he spends a large sum he may think in terms of amortizing his expenses over his working lifetime. Other candidates normally run for a short period of time, retain outside interests and have the door open at all times to go into or continue with other fields of endeavor.

The obsolescence of *McDonald* is sufficient for this Court to grant a writ of certiorari. This Court should not permit a question of this importance to be treated without considering contemporary conditions and problems.

2) Argument on Question 2

The application of the *McDonald* case to plaintiff's is wholly inconsistent with prevailing decisions of the Tax Court of the United States. These decisions came long after *McDonald* and are being followed, but despite their logical application to plaintiff's case the Court of Appeals refused to apply them.

In *McDonald*, the Court found that plaintiff was in the trade, business or occupation of a judge but held that his campaign expenses were incurred, not in that trade, business or occupation but rather to become a judge for the following term. In *Primuth*, 54 T.C. 374, *Kenfield*, 54 T.C. 1197 and *Cremona*, 58 T.C. 20, the tax court considered the deductibility from income of fees paid by corporate executives to find new positions. The Court held that such fees were legitimate deductions under Section 162(e) of the Internal Revenue Code. It was of no moment to the tax court that these fees were incurred by the tax payers to become something in the future.

We submit that there is a basic, underlying contradiction here between *McDonald* and the tax court cases which has been ignored by the Court of Appeals. Surely this Court should settle this problem of inconsistency.

3) Argument on Question 3

The Court of Appeals ignored the facts of this case which provides a basis for distinction from *McDonald*.

One might attempt to explain the inconsistency between

McDonald and the cited tax court cases by the fact that Judge McDonald had already made a change in his position when he incurred his expenses, but your plaintiff is in the identical position as the corporate executives in the tax court cases.

Until 1972 plaintiff was a practicing attorney within his profession of one who possessed legal training and was licensed to practice law. Suppose he had employed a counselor to find a position for him as a law professor or an in-house corporate attorney, why would not the fee be deductible? How could this be distinguished from the cases of the corporate executives? In the same way plaintiff incurred campaign expenses to change positions from practicing attorney to judge.

The *McDonald* case did not contain this ingredient. He was an incumbent judge who had already made the change.

4) Argument on Question 4

Because there is an iron clad argument for the application of the tax court decisions to plaintiff's case because of its peculiar and unique facts as distinguished from *McDonald*, under the law as interpreted by the Court of Appeals, plaintiffs are being discriminated against and are victims of gross injustice. The matter should be settled by this Court.

Plaintiff deducted his campaign expenses from income he derived principally as a practicing attorney in 1972. About 7% of his income in that year was derived from his salary as a judge, while the balance was derived from his law practice. There is no question that an attorney may deduct from his

income expenses which are customarily considered advertising expenses in other businesses and professions. By the exposure plaintiff received in his campaign from television, newspaper and other mass media as well as personal contacts with potential clients, plaintiff had the purpose of generating law business as well as promoting his candidacy.

The point is that in plaintiff's case it does not even matter that this was a political campaign. Plaintiff practiced law during and after the campaign. The exposure he received was directly related to the generation of law business on which fees were earned and taxes assessed in 1972. Even if plaintiff had lost his campaign the expenses would have been deductible on this basis.

Plaintiffs are not aware of any case where this issue has been raised and its presence makes *McDonald* inapplicable. Why should plaintiffs be given unequal treatment by the Courts of the United States in the interpretation of our income tax laws? We repeat -- *McDonald* is not the answer because its facts were different.

CONCLUSION

Petitioners pray that this Court grant a writ of certiorari to review the judgment of the Court of Appeals and in due course reverse that judgment, granting plaintiffs' motion for summary judgment and denying defendant's motion.

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CERTIFICATE OF SERVICE

I certify that I have, pursuant to paragraphs 1 and 2a of Rule 33, served three copies of the foregoing petition each on counsel of record, Gerald J. Gallinghouse, United States Attorney, 500 Camp Street, New Orleans, La., 70130; Gilbert E. Andrews, Chief, Appellate Section, Tax Division, United States Department of Justice, Washington, D.C., 20530 and Solicitor General of the United States, Department of Justice, Washington, D.C., 20530, by mailing same to them air mail, postage prepaid.

New Orleans, Louisiana, December 21st, 1977.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 77-2044
Summary Calendar*

PATRICK M. SCHOTT and
MRS. JOAN G. SCHOTT,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(September 23, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

We agree with the opinion of the district court. For the reasons stated therein, its judgment is AFFIRMED.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. vs. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Mar 26,1977

PATRICK M. SCHOTT and MRS. JOAN G. SCHOTT — CIVIL ACTION

NO. 76-2277

versus

SECTION "C"

ROBERT M. CUTTS, DISTRICT DIRECTOR OF INTERNAL REVENUE

J U D G M E N T

The Court having previously granted the motion of defendant for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Robert M. Cutts, District Director of Internal Revenue, and against plaintiffs, Patrick M. Schott and Mrs. Joan G. Schott, dismissing said plaintiffs' suit, with costs.

Dated at New Orleans, Louisiana, this 25 day of March, 1977.

s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

J. Richard Reuter, Jr., Esq.
Leonard Avery, Esq.
William D. M. Holmes, Esq.

Date of Entry: Mar 28, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: Mar 25, 1977

PATRICK M. SCHOTT and MRS. JOAN G. SCHOTT
Plaintiffs

CIVIL ACTION

NO. 76-2277

VERSUS

SECTION "C"

ROBERT M. CUTTS, DISTRICT DIRECTOR OF INTERNAL REVENUE
Defendant

****

J. Richard Reuter, Jr., Esq.,
Attorney for Plaintiffs
Leonard Avery
Attorney for Defendant
William D. M. Holmes
Attorney for Defendant

RUBIN, District Judge:

These cross motions for summary judgment raise the question whether campaign expenses incurred by Patrick M. Schott (plaintiff),[1] in seeking election as a judge, are deductible under Section 162 of the Internal Revenue

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1. Joan G. Schott, the wife of Patrick Schott, who joined her husband in filing a joint income tax return for the year in issue, is also a plaintiff herein.

Code of 1954, 26 U.S.C. §162,[2] as ordinary and necessary business expenses, or under Section 212 of that Act, 26 U.S.C. §212,[3] as ordinary and necessary expenses incurred for the production of income.

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2. 26 U.S.C. §162, provides in relevant part:
(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business***.

3. 26 U.S.C. §212, provides in relevant part:
In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year--
(1) for the production or collection of income
(2) for the management,conservation,or maintenance of property held for the production of income; or
(3) in connection with the determination, collection, or refund of any tax.

On September 20, 1972, Patrick M. Schott was elected Judge of the Court of Appeals, Fourth Circuit, State of Louisiana. On their tax return for 1972, Judge Schott and his wife claimed as a deduction unreimbursed campaign expenses incurred in his election campaign. The Commissioner of Internal Revenue disallowed the deduction of these campaign expenses on the grounds that they were not deductible for income tax purposes as ordinary or necessary expenses incurred either in the carrying on of a trade or business or in the production of income. An additional tax liability was assessed against the plaintiffs, and thereafter paid in full.

This action was instituted to gain a refund of the sum paid, $3,879.37, plus interest. The parties agree that the sole issue is whether, as a matter of law, the plaintiffs are entitled to deduct the expenses. If they are, then they are also entitled to summary judgment; if they are not, then the defendant is entitled to summary judgment.

In McDonald v. Commissioner, 1944, 323 U.S. 57, the Supreme Court held that campaign expenditures incurred by a state court judge, in seeking

election, were not deductible under the predecessor of Section 162 (§23(a)(1), Internal Revenue Code of 1939), or under the predecessor of Section 212 (§23(a)(2) of the 1939 Code). The court found "the performance by petitioner of his judicial office constituted carrying on of a 'trade or business' within the terms of Section 23 of the Internal Revenue Code," 323 U.S., at 59, but nevertheless concluded that campaign expenses were not deductible:

> He was therefore entitled to deduct from his gross income all the 'ordinary and necessary expenses' paid during 1939 in carrying on that 'trade or business'. He could, that is, deduct all expenses that related to the discharge of his functions as a judge. But his campaign contributions were not expenses incurred in being a judge for the next ten years. 323 U.S., at 59-60.

The Court of Appeals for the Fifth Circuit, as well as several other circuits, have since uniformly applied McDonald, to deny the deduction of campaign expenses in similar circumstances. Nichols v. Commissioner, 5 Cir. 1975, 511 F.2d 618; Maness v. United States, 5 Cir., 1966, 367 F.2d 357; Campbell v. Davenport, 5 Cir., 1966, 362 F.2d 624;

Levy v. United States, Ct. Cl. 1976, 535 F.2d 47; Shoyer v. United States, 3 Cir., 1961, 290 F.2d 817; Carey v. Commissioner, 1971, 56 T.C. 477, aff'd, C.A. 4, 1972, 460 F.2d 1259.

The plaintiff argues that times and attitudes have changed, and that the Internal Revenue Code should be reinterpreted to adjust tax deductions to contemporary reality. Bound as a lower federal court to adhere to the decisions of the United States Supreme Court, and finding no later indication in its decisions that the precedent of McDonald has been sapped, this court must refer the argument for bringing the Internal Revenue Code up to date to the Congress.

For these reasons, plaintiff is not entitled to deduct the campaign expenses in issue. Accordingly, the plaintiff's motion for summary judgment is DENIED, and the defendant's motion for summary judgment is GRANTED.

s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 25, 1977

Date of Entry: Mar 28,1977.

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No. 77-906

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICK M. SCHOTT, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-906

PATRICK M. SCHOTT, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented in this federal income tax case is whether the decision below correctly held that petitioner[1] could not claim a deduction for his unreimbursed campaign expenses incurred in his successful bid for election to a state court judgeship.

In 1972, petitioner, a practicing attorney, waged a successful campaign for election to a state court judgeship in Louisiana. During the campaign, petitioner incurred various campaign expenses that were not reimbursed (Pet. App. A-5).

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[1]References to "petitioner" are to Patrick M. Schott. Joan G. Schott is a party because she filed a joint return with her husband for the year at issue.

On his 1972 tax return, petitioner claimed a deduction for his unreimbursed campaign expenses. On audit, the Commissioner of Internal Revenue disallowed this deduction on the ground that campaign expenses were not deductible as ordinary and necessary expenses incurred either in carrying on a trade or business or in the production of income. In this refund suit brought by petitioner in the United States District Court for the Eastern District of Louisiana, the district court upheld the Commissioner's determination (Pet. App. A-2 to A-7). The court of appeals affirmed *per curiam* (Pet. App. A-1).

1. Petitioner's claim for a deduction for campaign expenses is foreclosed by this Court's decision in *McDonald* v. *Commissioner*, 323 U.S. 57. There, the taxpayer accepted a temporary appointment to a state court judgeship. Subsequently, he stood for election to the judgeship to which he had been appointed. In order to obtain the support of his political party, he was obligated to pay an assessment to the party fund. After losing the election, the taxpayer sought to deduct the assessment as well as his other campaign expenses.

The Court held that the campaign expenses and assessment were not deductible under the predecessors of Sections 162 (trade or business expenses) and 212 (expenses incurred for the production or collection of income) (26 U.S.C.). The plurality opinion stated that the disallowance of such a deduction had been consistently reflected by legislative history, court decisions,[2] Treasury Regulations,[3] and Treasury administrative practice.

[2]The lower courts have consistently continued to deny deductions for personal campaign expenses. *E.g.*, *Nichols* v. *Commissioner*, 511 F. 2d 618 (C.A. 5) (*en banc*), certiorari denied, 423 U.S. 912; *Levy* v. *United States*, 535 F. 2d 47 (Ct. Cl.); *Hakim* v. *Commissioner*, 512 F. 2d 1379 (C.A. 6), certiorari denied, 429 U.S. 930; *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4), certiorari denied, 345 U.S. 969.

[3]This rule of nondeductibility is embodied in Treasury Regulations, Sections 1.162-20(c) and 1.212-1(f) (26 C.F.R.).

Contrary to petitioner's argument (Pet. 5-7), the considerations set forth in *McDonald* for disallowing a deduction for election campaign expenses are fully applicable to this case. Both the expenses here and in *McDonald* were incurred in seeking election to public office.[4] As the plurality opinion noted in *McDonald*, the relationship between expenses incurred in securing election to public office and a tax deduction involves issues of far reaching importance which Congress should address (see 323 U.S. at 63-65). However, Congress has never enacted any provision allowing the deduction petitioner seeks. Instead, it has generally denied deductions for political contributions.[5] There is accordingly no statutory basis for petitioner's claimed deduction.

2. Contrary to petitioner's further assertion (Pet. 8), *McDonald* and its progeny in the lower courts do not conflict with the Tax Court's decisions in *Primuth* v.

[4]Petitioner alternatively argues (Pet. 9-10) that his campaign expenses are deductible as advertising expenses. But there is nothing in the record that suggests that there was any connection between the expenses and his law practice. The origin of these expenses was petitioner's desire to be elected to public office, not the desire for increased legal business. The expenses are therefore not deductible as advertising expenses. *Maness* v. *Commissioner*, 54 T.C. 1602, 1604-1607.

[5]See, *e.g.*, Section 162(e)(2) (nondeductibility as business expenses of amounts contributed to political campaign or efforts to influence legislation); Section 170(c)(2) (denying charitable contribution deductions with respect to gifts to political campaigns or organizations engaged in influencing legislation); Section 271 (providing that a taxpayer may not deduct as bad debts amounts owed to him by a political party); Section 276 (disallowing deductions for certain indirect contributions to political parties); Section 501(c)(3) (denying tax-exempt treatment to any organization which devoted a substantial part of its activities to influencing legislation or participating in political campaigns); Section 4945(a), (d)(1) and (e) (imposing a tax on the expenditures of a private foundation made for the purposes of influencing legislation) (26 U.S.C.).

Commissioner, 54 T.C. 374; *Kenfield* v. *Commissioner*, 54 T.C. 1197; and *Cremona* v. *Commissioner*, 58 T.C. 219, upholding claimed deductions for employment agency fees. Apart from the fact that this Court does not resolve conflicts between the Tax Court and the courts of appeals, the Tax Court has stated that the policy considerations present in the political sphere distinguish campaign expenses from expenses incurred in a search for employment. *Martino* v. *Commissioner*, 62 T.C. 840, 844-845. See also *Nichols* v. *Commissioner*, 511 F. 2d 618, 620 (C.A. 5) (*en banc*), certiorari denied, 423 U.S. 912.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.